Order

Michigan Supreme Court
Lansing, Michigan

June 30, 2023

Elizabeth T. Clement,
Chief Justice

163412

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

LEONARD WILSON,
Claimant-Appellant,

v

SC: 163412
COA: 349078
Ingham CC: 18-000711-AE

MEIJER GREAT LAKES LIMITED PARTNERSHIP and UNEMPLOYMENT INSURANCE AGENCY,
Respondents-Appellees.

_____/

On April 5, 2023, the Court heard oral argument on the application for leave to appeal the July 1, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CLEMENT, C.J. (*concurring*).

I agree with this Court's decision to deny leave to appeal, but write separately to bring to the Legislature's attention concerns that application of the plain-language interpretation of the statute at hand could result in unintended outcomes.

The present case concerns former employee Leonard Wilson's claim for unemployment benefits regarding his termination from Meijer Great Lakes Limited Partnership (Meijer) under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. Wilson was arrested and jailed on September 4, 2017, and as a result, he was not able to work his scheduled shifts on September 5, 6, 7, and 8. On September 5, after his shift began, Wilson used his courtesy call to notify Meijer that he was missing work because of "unusual circumstances"; he was unable to reach his supervisor directly, as Meijer's absence policy required, but left a message. Thereafter, on September 6, 7, and 8, Wilson was unable to contact Meijer because Meijer did not accept collect calls and Wilson could not afford to make paid calls from jail. Meijer terminated Wilson on September 8 pursuant to its policy of termination after three consecutive no-call, no-show absences. Wilson thereafter applied for unemployment benefits and was denied. The Michigan Compensation Appellate Commission and the Court of Appeals below affirmed

the denial of benefits on the grounds that Wilson had voluntarily left work under MCL 421.29(1)(a), rendering him ineligible for benefits.

The Legislature enacted the MESA to "safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment." *Tomei v Gen Motors Corp*, 194 Mich App 180, 184 (1992). Unemployment benefits under the MESA are limited to those persons *involuntarily* unemployed, and, pursuant to that requirement, MCL 421.29(1)(a) provides that an employee who "[l]e[aves] work voluntarily without good cause attributable to the employer or employing unit" is disqualified from receiving benefits. The MESA further establishes that an employee who "left work" is presumed to have left work voluntarily and without good cause. *Id*. Employees may rebut this presumption with evidence that they left work involuntarily or that their leaving was for good cause attributable to the employer—i.e., "where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment." *McArthur v Borman's, Inc*, 200 Mich App 686, 693 (1993) (quotation marks and citations omitted); see also *Warren v Caro Community Hosp*, 457 Mich 361, 366-367 (1998).

At issue in the present case is whether this rebuttable-presumption framework applies to language added to MCL 421.29(1)(a) in 2011, colloquially referred to as the "no-call, no-show provision." After the addition of this language, MCL 421.29(1)(a) provided, in relevant part, that an employee is disqualified from benefits where the employee:

> Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. *An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.* An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. [MCL 421.29(1)(a), as amended by 2011 PA 269 (emphasis added).]

Wilson argues that the sole purpose of the no-call, no-show provision was to move absenteeism, which had previously been considered under the misconduct provision of the MESA, MCL 421.29(1)(b), to the voluntary-leave provision of the MESA, MCL 421.29(1)(a). However, the Court of Appeals below concluded that the no-call, no-show

provision also established that an employee who met its factual requirements—i.e., "who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire"—is ineligible for benefits because they are classified as having left work voluntarily without good cause. In other words, the parties dispute whether an employee who fulfills the factual requirements of the no-call, no-show provision is classified as having left work voluntarily without good cause and is therefore ineligible for benefits or is only *presumed* to have left work voluntarily without good cause and is ineligible for benefits unless they can rebut the presumption.

When interpreting statutory language like the no-call, no-show provision, reviewing courts must first consider the plain language of the provision. *Driver v Naini*, 490 Mich 239, 246-247 (2011). If that language is clear and unambiguous, no further judicial construction is permitted. *Id*. at 247. I agree with the Court of Appeals below that the clear and unambiguous language of the no-call, no-show provision establishes that an employee who has been absent for three consecutive workdays without providing acceptable notice has left work voluntarily without good cause. The operative language "shall be considered" establishes a mandatory judgment, not a presumption. The use of the word "shall" generally "indicates a mandatory and imperative directive[.]" *Burton v Reed City Hosp Corp*, 471 Mich 745, 752 (2005). And while the term "consider" has a variety of definitions, the most relevant to the circumstances at hand is "to come to judge or classify." *Merriam-Webster's Collegiate Dictionary* (11th ed). Accordingly, an employee who meets the factual requirements of the no-call, no-show provision must be classified as having left work voluntarily and without good cause, which renders the employee ineligible for benefits. MCL 421.29(1)(a). As the Court of Appeals concluded below, the no-call, no-show provision of the MESA "is, in essence, a definition of one instance where an individual is, as a matter of law, deemed to have voluntarily left work without good cause." *Wilson v Meijer Great Lakes Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued July 1, 2021 (Docket No. 349078), p 4. Had the Legislature intended for the no-call, no-show provision to establish only a presumption that the employee had left work voluntarily without good cause, the Legislature would have used the language "is presumed"—as it did elsewhere in the same statutory provision. See *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14 (2009) ("When the Legislature uses different words, the words are generally intended to connote different meanings."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), § 25, p 170.

Because I agree with the Court of Appeals' interpretation of the no-call, no-show provision and its application of that interpretation to the facts at hand to conclude that Wilson is not eligible for unemployment benefits, I do not dissent from this Court's order denying leave to appeal. However, I agree with Wilson and amicus curiae, the Michigan Poverty Law Program, that this plain-language interpretation of the statute may yield results inconsistent with the goal of the MESA. For example, consider an employee who

is involved in an automobile accident on their way to work. The employee is injured, and they are hospitalized and unconscious for three days as a result of their injuries. The employee misses three consecutive days of work through no fault of their own and is unable to provide notice of their absence to their employer during that time because of their injuries. Even if a close family member of the employee was able to notify the employer, this alone might not satisfy the company's specific absence policy requirements. Under the no-call, no-show provision, this employee will be ineligible for unemployment benefits if terminated by their employer because they were "absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire." MCL 421.29(1)(a). This result appears at odds with the MESA's intent to provide compensation to those persons involuntarily unemployed and renders employees who did not engage in dilatory action or wrongdoing ineligible for unemployment benefits. Outside of this specific hypothetical situation, numerous other factual circumstances exist that could cause an employee to be unable to provide proper notice of involuntary absence to their employer that results in ineligibility for unemployment benefits if terminated. This application of the no-call, no-show provision might also result in inequities where jailed persons who can afford to call their employers pursuant to their employers' absence policies remain eligible for unemployment benefits if terminated because of their absence, whereas those persons who cannot afford to do so are rendered ineligible for unemployment benefits. Ultimately, however, these concerns cannot trump the plain language of the statute as enacted by the Legislature. See *Petrelius v Houghton-Portage Twp Schs*, 281 Mich App 520, 524 (2008). Further, in enacting remedial statutes, the Legislature must generally engage in some amount of line-drawing, and "[h]ow and why the Legislature draws the lines between those entitled to recover and those who are not are questions typically outside the purview of judicial review." *Ricks v Michigan*, 507 Mich 387, 423 (2021) (ZAHRA, J., dissenting).

I respectfully concur, and the Legislature may, or may not, wish to address the additional concerns raised by this statement.

WELCH, J., joins the statement of CLEMENT, C.J.

CAVANAGH, J. (*concurring*).

I agree with the Court's decision to deny leave to appeal. I agree with the Court of Appeals and Chief Justice CLEMENT to the extent they conclude that the "no-call, no-show provision" in MCL 421.29(1)(a) does not include an independent "voluntariness" inquiry

as this Court has defined it in the context of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*.[1] I echo the Chief Justice's suggestion that the Legislature consider whether an amendment is warranted to more closely align this provision with MESA's larger purpose, which is to provide compensation to persons who are involuntarily unemployed. See MCL 421.2; MCL 421.8.

I write separately to note that this case does not appear to implicate the hypothetical situation in which it would be physically *impossible* for an employee to show up for work or call their employer, such as a car accident that leaves an employee unconscious. While the parties and lower courts here sometimes conflate the concepts (and there is obvious overlap), there is seemingly a meaningful distinction between voluntariness as this Court has defined it in the MESA context and the narrower concept of impossibility or voluntariness under the common law. See, e.g., *People v Likine*, 492 Mich 367, 393-396 (2012). The applicability of the latter concepts to the no-call, no-show provision has not been briefed and does not appear to be implicated under the facts of this case. Accordingly, I would not presume that, even as currently written, this provision precludes consideration of impossibility or voluntariness in this narrower common-law sense.[2]

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[1] See, e.g., *Lyons v Employment Security Comm*, 363 Mich 201 (1961); *Warren v Caro Community Hosp*, 457 Mich 361 (1998). In her Court of Appeals dissenting opinion, Judge RONAYNE KRAUSE concisely summarized this Court's MESA caselaw as defining "involuntary" in this context as "the absence of realistically available reasonable alternatives, or the external imposition of constraints, irrespective of whether those constraints are a consequence of a voluntary act." *Wilson v Great Lakes Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued July 1, 2021 (Docket No. 349078) (RONAYNE KRAUSE, J., dissenting), p 3.

[2] To the extent that the Court of Appeals opinion here implies that an employee's circumstances are *never* relevant to whether the no-call, no-show provision is implicated, the decision is unpublished and therefore is not binding precedent. MCR 7.215(C)(1). Moreover, this Court's denial of leave to appeal is not binding precedent either. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313 n 3 (2017).